Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-52

JOSE DEMETRIO ARTEAGA-LIMONES,

Petitioner

v.

THE UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Jose Demetrio Arteaga-Limones, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in this case on April 8, 1976, petition for rehearing denied June 9, 1976.

OPINION BELOW

The opinion of the Court of Appeals is not yet reported. It affirmed (with a dissent) a judgment of conviction of petitioner for conspiracy to import marijuana, importation of

marijuana, conspiracy to possess marijuana with intent to distribute, and possession of marijuana with intent to distribute Petitioner was tried in the District Court by a jury, and there is no opinion of that Court.

JURISDICTION

The judgment of the United States Court of Appeals was entered on April 8, 1976, petition for rehearing denied on June 9, 1976. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Whether the consecutive sentences received by Petitioner on two conspiracy counts violated his Fifth Amendment right not to be twice punished for the same offense, when the evidence showed only one conspiracy?

2. Whether Petitioner was denied due process and a fair trial when a twelve-year old conviction was introduced against Petitioner during the Government's case-in-chief?

3. Whether Petitioner was effectively prevented by action of the Government from asserting his only defense, alibi, and thus denied due process and a fair trial, by virtue of the Government's inability to plead with certainty, and the Government's only material witness' inability to remember, the dates when the criminal conduct occurred?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The Fifth Amendment, United States Constitution.

2. The Sixth Amendment, United States Constitution.

3. Two of the statutes under which Petitioner was prosecuted, although nothing turns on their terms, were 21 U.S.C. §§ 846 and 963.

STATEMENT

After a jury trial in the United States District Court for the Western District of Texas, Del Rio Division, Petitioner was convicted on all four courts charging violations of 21 U.S.C. §§ 963, 952(a), 846, and 841(a)(1). He received a sentence of five years imprisonment and five years special parole on each count, to be served consecutively.

The evidence concerning the actus rea of the offenses charged came from one Julio Castillo-de-la Garza (hereinafter referred to as "Castillo"). The chronology of events testified to by Castillo is set forth in detail in the opinion below. (See Appendix "A", *infra.*) Castillo was an unindicted co-conspirator in Petitioner's indictment, an admitted perjurer, and awaiting sentence at the time of Petitioner's trial for a separate drug transaction not involving Arteaga.

The transaction alleged in the indictment with respect to Petitioner was, in essence, a completed one which occurred between January 1, 1973, and October 7, 1973. Said transaction remained undetected until Castillo was convicted at his own trial of an unrelated charge in May, 1974, of importation of 301 pounds of hashish. Castillo then came forward and confessed all at Petitioner's trial, including the fact that he had perjured himself at his own trial in order "to get out of the charge."

At trial, Petitioner attempted to interpose the defense of alibi, both through cross-examination of Castillo, and by the undisputed and unimpeached defense testimony of attorneys from Mexico, to show that on January 29-30, 1973, and continuously from April 26, 1973, to May 20, 1973, Petitioner was in Guadalajara, Mexico, and thus could not have been in Del Rio, Texas, on May 5, 1973, when the marijuana was supposed to have been imported, nor in San Marcos, Texas, on May 16, 1973, when the marijuana purportedly was distributed.

The replies to Petitioner's questions which attempted to tie

Castillo down to a date certain are best exemplified by that exchange set out in footnote 5 of the opinion below. (See Appendix "A", *infra.*) The record is replete with other examples of Castillo's loss of memory of key dates. The indictment itself alleged dates "on or about, the exact date unknown."

Furthermore, during the trial in its case-in-chief, the Government introduced over Petitioner's objection a twelve-year old conviction of Petitioner for "smuggling marijuana" (21 U.S.C. §176a, since repealed). The District Court erroneously admitted (as found by the Court below) the prior conviction under the theory that since the prior conviction was for a similar offense, it was admissible on the issue of intent or guilty knowledge.

REASONS FOR GRANTING THE WRIT

1. The opinion below is in conflict with opinions of the First and Sixth Circuits which preclude multiple punishments for conspiracy to import narcotics and conspiracy to possess narcotics with the intent to distribute where the evidence shows only one criminal agreement. *United States v. Honneus*, 508 F.2d 566 (1st Cir., 1974), cert. denied, 421 U.S. 945, 44 L.Ed 2d 101, 95 S.Ct. 1677; *United States v. Adcock*, 487 F.2d 637 (6th Cir., 1973).

The Court below, without citation, apparently aligns itself with the leading case in the Fifth Circuit on the issue, *United States v. Houltin*, 525 F.2d 943 (5th Cir., 1976) and the Ninth Circuit, *United States v. Marotta*, 518 F.2d 681 (9th Cir., 1975).

Another conflict, in interpretations of opinions of this Court, is apparent from an analysis of the various cases condemning or sustaining the practice of double sentencing. In those cases condemning the practice, *Honneus, supra*; *Adcock, supra*, c.f. *United States v. Mori*, 444 F.2d 240 (5th Cir., 1971); *United States v. Noah*, 475 F.2d 688 (9th Cir., 1973), *Braverman v. United States*, 317 U.S. 49, 87 L.Ed. 23, 63 S.Ct. 99 (1943), is

cited as authority. In that line of cases sustaining the practice, *Houltin, supra, Marotta, supra* and Petitioner's opinion below, *American Tobacco Co. v. United States*, 328 U.S. 781, 90 L.Ed. 1575, 66 S.Ct. 1125 (1946), is cited as authority and *Braverman, supra*, is distinguished or not considered. Petitioner submits that the confusion caused between *Braverman* and *American Tobacco* should be resolved and that direction be given the various Circuits and District Courts as to their applications.

But *Houltin, supra*, and *Marotta, supra*, tred farther than reliance upon *American Tobacco*. While conceding in *Marotta* and by implication conceding in *Houltin*, that there was only one agreement, the respective Courts of Appeal find that it was the *intent of Congress* in enacting separate conspiracy statutes (21 U.S.C. §§ 963 and 846) to punish ". . . such conspiracies twice as severely as those which embrace only one of the specified criminal objects." *Marotta, supra*, at 685.

The fallacies in that logic are manifest and are of constitutional magnitude.

To begin with, the rulings in *Houltin* and *Marotta* do not take into account the necessity for separate conspiracy statutes to cover the situation where there is only proof of one or the other.

But more importantly, both rulings miss the *intent* of Congress in separately enacting §§ 963 and 846 by a mile. What the Courts of Appeal in *Houltin* and *Marotta* see as a Congressional mandate to doubly punish drug offenders, is actually nothing more than Congressional Committee jurisdictional delineation.

> The legislation [Comprehensive Drug Abuse Prevention And Control Act of 1970] was further considered in executive sessions before the full Interstate and Foreign Commerce Committee on 8 occasions, and titles I and II were ordered reported to the House unanimously on August 14, 1970, together with title III [21 U.S.C. §§ 951

et. seq.] incorporated in the bill pursuant to action of the Ways and Means Committee. (as indicated below).

. . . Because the proposed legislation repeals the tax laws and other laws under the jurisdiction of the Committee on Ways and Means used to control narcotic drugs, the President's message was first referred to the Committee on Ways and Means. However, because the proposed legislation also deals with drugs regulated under the Federal Food, Drug, and Cosmetic Act, the proposed legislation was divided into two bills, H.R. 13742 (referred to the Committee on Ways and Means) and H.R. 13743 (referred to the Committee on Interstate and Foreign Commerce.)

. . . Thereafter the Committee on Ways and Means decided to consider only the provisions relating to imports and exports of narcotic drugs, marijuana, and depressant and stimulant drugs and recommended to the Interstate and Foreign Commerce Committee an amendment to H.R. 18583 which is incorporated in the bill as title III thereof The reported bill is based upon the provisions of the legislation heretofore discussed, *with the form in which the bill is reported being designed to preserve the jurisdiction of the Ways and Means Committee over future amendments to this legislation relating to imports and exports of drugs covered by the bill.* H.R. Rep. No. 91-1444, 90th Cong. (1970) (bracketed and italicized material added).

The legislative history cited at length above indicates that the *intent* of Congress had nothing to do with punishment considerations.

Even *if* the intent of Congress could arguably be said to have been to doubly punish drug offenders, Congress may not by its legislation override the Constitution any more than Courts by their opinions may ignore the Constitution. c.f. *United States v. Brignoni-Ponce*, ... U.S. ....., L.Ed.2d 607, 95 S.Ct. ....., (1975). Since Congress may not legislate around the Fifth Amendment, it can only be assumed that the Court

of Appeal in *Houltin* and *Marotta* chose to ignore the Constitution and add additional punishment on top of that authorized by Congress.

> . . . it is for Congress to prescribe the penalties for the laws which it writes. It would transcend both the judicial and administrative function to make additions to those which Congress has placed behind a statute. *L.P. Steuart & Bro. v. Bowles*, 322 U.S. 398, 404, 88 L.Ed. 1350, 1354, 64 S.Ct. 1097 (1944).

The Court below chose to take the facts and add 1 plus 0 to come up with 2. The facts in Petitioner's case can support but one finding, and that is one conspiracy.

This Honorable Court has formulated the standard for determining when there are one or more conspiracies, and that is whether "a common end or single unified purpose" is to be achieved by the conspirators. *Blumenthal v. United States*, 332 U.S. 539, 92 L.Ed. 154 68 S.Ct. 248 (1947). The *Marotta, Houltin* and Petitioner's decisions fly directly in the face of that standard, and present further grounds for this Honorable Court to grant Petitioner's application.

2. This case merits review by this Honorable Court on certiorari because this Court needs to settle the question of when, without violating due process or the right to a fair trial, proof of a prior conviction may be had during the Government's case-in-chief.

The Court below found that the introduction of the 1961 conviction of Petitioner for "smuggling marijuana" was error, the conviction being too remote to be probative and the prejudice to the Petitioner greater than any need for the proof by the Government. Quoting from the opinion, (Appendix "A", p.p. 2821-22 *infra*):

> Arteaga did not limit his challenge to the *mens rea*; rather, he attacked the whole account. In such cases, the danger of convicting defendants for their evil character,

> instead of their evil acts remains great. Where, as here, the evidence is not reasonably susceptible of the interpretation that the acts alleged to constitute the crime were innocently performed and no defense is presented which may properly be rebutted by the introduction of the prior conviction, the intent exception to the rule against admitting prior convictions is not available.

Having found error otherwise sufficient for reversal, the Court below concluded that this error had not been sufficiently called to the Trial Court's attention (Rule 51, Federal Rules of Criminal Procedure) and was therefore not properly preserved for review. The majority below went on to find the error harmless even if preserved due to some incriminating statements concerning Petitioner's knowledge of drug trafficking made to Government witness Justice of the Peace Roger Cerny.

Petitioner would submit, for the sake of brevity, that the dissenting opinion below of Judge Charles Clark sufficiently answers the preservation and harmless error questions. (See Appendix "A", p.p. 2824-26, *infra.*)

This Court has never squarely met the question here presented. *Spencer v. Texas*, 385 U.S. 554, 17 L.Ed.2d 606, 87 S.Ct. 648 (1967) (dissenting opinion of Chief Justice Warren at U.S. 572-73; L.Ed. 2d 619).

It is axiomatic that a defendant has the right to a determination of guilt or innocence based solely upon the charge brought against him. *Boyd v. United States*, 142 U.S. 450, 35 L.Ed. 1077, 12 S.Ct. (1892). The Court below having correctly decided that the introduction of the 1961 conviction met no cognizable exception to the general prohibition against such matters, the inescapable conclusion is that the Petitioner was tried before this Jury as being a criminal generally. If this is not sufficient to rise to error of constitutional gravity, it should at least be sufficient to invoke the exercise of this Court's supervisory power to formulate and apply proper standards for enforcement of the criminal law in federal courts. *Marshall v. United States*, 360 U.S. 310, 3 L.Ed.2d 1250, 79 S.Ct. 1171

(1959). The confusion this question has caused in the lower federal courts is amply reflected by the confusion of the District Judge, prosecutor and defense attorney in the dialogue quoted in the opinion below (Appendix "A", p.p. 2819-20, *infra*) as to the grounds for admissibility. The question of the admissibility of prior convictions during the Government's *case-in-chief* is particularly serious because it strips the defendant of the presumption of innocence in the eyes of the Jury before he's had an opportunity to utter a word or offer witnesses.

The proposition that the Government may introduce during its *case-in-chief* prior convictions for similar offenses bearing on the issue of innocent intent or knowledge, before that element has ever been *raised* by any defensive testimony, is preposterous. Petitioner's case is a classic example. Assuming for the sake of argument that the 1961 conviction was admissible on the theory that it went to negate the lack of innocent intent, how could its admission be ripe in the Government's case-in-chief? If, as in Petitioner's case, it subsequently became obvious that his defense was not lack of innocent intent, but rather "alibi", or an unqualified plea of "not guilty", would the District Court upon defense motion or on its own motion be required to direct the Jury to disregard the previously admitted prior conviction? The Petitioner's guilt or innocence should not be predicated upon the Government's ability to second guess his defensive strategy, particularly where the prior conviction was inadmissible under *any* theory at the time it was introduced. c.f. *Marshall, supra.*

> However depraved in character, and however full of crime their past lives may have been, the defendants were entitled to be tried upon competent evidence, and only for th offense charged. *Boyd, supra*, at U.S. 458, L.Ed. 1080.

3. This Honorable Court expressly left open the question as to whether pre-arrest delay could result in a denial of due process in *United States v. Martin*, 404 U.S. 307, 30 L.Ed.2d 468, 92 S.Ct. 455 (1971). "However, we need not, and could not now, determine when and in what circumstances *actual preju-*

dice resulting pre-accusation delays requires the dismissal of the prosecution . . . To accomodate the sound administration of justice to the rights of the defendant to a fair trial will necessarily involve a delicate judgment based on the circumstances in each case." *Marion, supra,* at U.S. 324-25, L.Ed.2d 481. (Emphasis added).

Petitioner does not contend that the indictment was not presented within the applicable statute of limitations. Nor does he claim a denial of the right to a speedy trial once the indictment was returned.

He *does* contend that the unwillingness or inability of the Government's only fact witness, an admitted perjurer, to recall the dates involved, in the manner the Government presented its case, effectively denied him, to his substantial prejudice, the ability to present his only defense, and thus denied him the due process of law.

The length of time between the crime alleged and the Petitioner's arrest is not the crucial element. What is crucial is that during that time, the Government's sole fact witness, Castillo, "forgot" when the crime was to have occurred.

Petitioner was thwarted at every turn in his effort to establish an alibi based on the dates "alleged" in the indictment.

He was frustrated by the very allegations of the indictment, ". . . the exact date unknown to the grand jurors . . ." He was thwarted by the Court's charge. (Appendix "A", p. 2817, *infra.*) He was thwarted by argument of the Government, e.g., "The Grand Jury Indictment charges on or about a certain date, the exact date unknown. Where is the requirement that the Government prove it happened exactly on a certain date?"

In fact, the Government attempted to *base* its prosecution upon its inability to prove exact or near-exact dates: "The Grand Jury Indictment does not require and does not exhibit and does not allege a specific date. Mr. Castillo never alleged

or testified to a specific date. And I suggest to you that that is a defense of this case to set up specific dates and then show they didn't happen on specific dates. The Defense Attorneys are the ones who are alleging that things happened on specific dates. And they are alleging other things happened on those same specific dates." But most of all, Petitioner was frustrated, thwarted and prejudiced by the *repeated* assertions of Castillo, an admitted perjurer, that he, Castillo, "did not remember" the dates. The best Castillo could do was parrot the phrase "mas o menos" (more or less), when the defense attempted to tie him to a date certain. Petitioner's indictment, by virtue of Castillo's testimony alleges no dates upon which a defense could be established.

Petitioner concedes that ordinarily "time" is not an element of an offense.

However, in order to present a defense of alibi, *under the facts of this case*, would Petitioner have to account, through witnesses, for his whereabouts during every minute of every day and night between January 1, 1973, and October 9, 1973? The very asking of the question points out the ludicrousness of the Government's contention that it is not bound to *any* date, as it also points out the impossibility of the burden upon the Petitioner.

To hold—where, as here, a factual, *unimpeached* defense places the date of the commission of the offense in issue—that the Government without discernible parameters, need not prove a date "within reasonable limits," c.f. *Russell v. United States*, 429 F.2d 237, 238, (5th Cir., 1970), but may hide behind "the exact date unknown, mas o menos", is to abolish the defense of alibi, and make an unqualified plea of "not guilty" meaningless.

Within the import of *Marion*, Petitioner was prejudiced by the unwillingness or inability of the admitted perjurer Castillo to remember the dates involved, and thus he was denied due process of law and a fair trial. See also, *United States v. Cov-*

ington, 411 F.2d 1087, 1089 (4th Cir., 1969); *Ross v. United States*, 349 F.2d 210 (D.C. Cir., 1965). The claim of prejudice the Court in *Marion* found to be premature, has matured in Petitioner's case, and bore fruit for the Government.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for certiorari should be granted to review the judgment of the United States Court of Appeals for the Fifth Circuit.

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CERTIFICATE OF SERVICE

I, a member of the bar of this Court, certify that a true and correct copy of the foregoing Petition for Writ of Certiorari was delivered by United States Mail, certified, to the Solicitor General, Department of Justice, Washington, D.C. 20530, on this the 14th day of July, 1976.

KENNETH E. HOUP, JR.

APPENDICES

UNITED STATES of America, Plaintiff-Appellee,

v.

Jose Demetrio ARTEAGA-LIMONES and Mike Lozano Cantu, Defendants-Appellants.

No. 75-1648.

United States Court of Appeals, Fifth Circuit.

April 8, 1976.

The United States District Court for the Western District of Texas, at Del Rio, John H. Wood, Jr., J., found defendants guilty of drug-related offenses, and they appealed. The Court of Appeals, Ingraham, Circuit Judge, held, inter alia, that where no allegation of a variance between the narcotics charges and proof was made, and no other circumstance demonstrating that defendant was in any way disadvantaged was brought to light, there was no error in the fact that each count of the indictment did not repeat the division and district in which the crime was charged to have been committed; and that where defendant's prior narcotics conviction was clearly admissible, as pointed out by the government at trial, to show a common design, scheme or plan, where the evidence was, however, admitted by the court on an incorrect theory to establish criminal intent, and where defense counsel asked only that the evidence be excluded, the court's technical error in apparently basing its ruling on the wrong ground did not result in prejudice to defendant and did not require reversal. As to the other defendant, the Court held, inter alia, that his prior conviction, while elementally nearly identical to the charges in the instant case, was committed 12 years before and was too remote to possess probative value; further, the need for such proof was outweighed by the potential prejudice to defendant; however, defendant's objection at trial was too loosely formulated and imprecise to apprise the court of the legal grounds for his complaint and the error was thus not preserved for appellate review.

Affirmed.

Clark, Circuit Judge, filed an opinion concurring in part and dissenting in part.

1. Criminal Law ⇐1177

Since defendant received concurrent sentences, no reversible error was present if the proof was adequate as to either count.

2. Criminal Law ⇐1144.13(3)

On appeal from a conviction, Court of Appeals must view the evidence in light most favorable to the Government.

3. Conspiracy ⇐47(1)

Only slight evidence is required to link a defendant to a conspiracy once the fact of conspiracy has been established.

4. Conspiracy ⇐47(12)
Drugs and Narcotics ⇐123

Jury could reasonably find, from the testimony as to defendant's involvement with another individual who was convicted of illegally importing hashish, his provision of hiding place for marijuana and his service as a delivery courier, that he participated in the charged conspiracy to possess marijuana with intent to distribute; and the latter activity, allegedly involving a transfer of marijuana at San Marcos, Texas, also provided a valid basis for a finding that defendant possessed marijuana with intent to distrib-

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ute it. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401(a)(1), 406, 21 U.S.C.A. §§ 841(a)(1), 846.

5. Indictment and Information ⇐55

Validity of an indictment is determined by practical, not technical, considerations. Fed.Rules Crim.Proc. rule 7(c), 18 U.S.C.A.

6. Indictment and Information ⇐117

While the counts of an indictment must stand independently for the purpose of being judged as to sufficiency, they need not be read apart from the caption and heading of the indictment.

7. Criminal Law ⇐113

Defendants had the right to be tried in the district and division where the offense was committed, not the right to be told they would be tried there.

8. Indictment and Information ⇐86(2)

Where no allegation of a variance between the narcotics charges and proof was made, and no other circumstance demonstrating that defendant was in any way disadvantaged was brought to light, there was no error in the fact that each count of the indictment did not repeat the division and district in which the crime was charged to have been committed.

9. Criminal Law ⇐1169.11

Where defendant's prior narcotics conviction was clearly admissible, as pointed out by the government at trial, to show a common design, scheme or plan, where the evidence was, however, admitted by the court on an incorrect theory to establish criminal intent, and where defense counsel asked only that the evidence be excluded, the court's technical error in apparently basing its ruling on the wrong ground did not result in prejudice to defendant and did not require reversal.

10. Criminal Law ⇐1159.2(1)

Standard for review of the sufficiency of the evidence, irrespective of whether the evidence is direct or circumstantial, is whether reasonable minds could conclude that the evidence is inconsistent with the hypothesis of the accused's innocence.

11. Conspiracy ⇐47(12)
Drugs and Narcotics ⇐123, 124

Evidence adduced at trial clearly supported jury's verdict finding defendant guilty of conspiracy to import marijuana, illegal importation of marijuana, conspiracy to possess marijuana with intent to distribute, and possession of marijuana with intent to distribute. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401(a)(1), 406, 1002(a), 1010(a)(1), 1013, 21 U.S.C.A. §§ 841(a)(1), 846, 952(a), 960(a)(1), 963.

12. Criminal Law ⇐1037.1(1)

Although the prosecutor's closing remarks, tending to vouch for the credibility of the Government's primary witness, were improper and unprofessional, they did not constitute plain error preserved in the absence of objection at trial, and furthermore, the trial court's repeated admonitions to the jury that nothing said during argument could be considered as evidence dispelled any prejudice which may have arisen.

13. Criminal Law ⇐1038.3

Because defendant failed to request an instruction concerning the credibility of the prosecution's chief witness, an admitted perjurer, a proper foundation was not laid to obtain review of that alleged error. Fed.Rules Crim.Proc. rules 7(c), 18, 18 U.S.C.A.

14. Criminal Law ⇐1168(1)

While defendant claimed that, because his defense of alibi was dependent upon a showing that he was nowhere near the place where the offenses occurred on the dates alleged, he was prejudiced by the Government's failure to prove the exact dates of the offenses charged, defendant was not in fact prejudiced by the chief prosecution witness' failure of memory, considering the trial court's careful admonitions and defense counsel's vigorous cross-examination of the witness.

15. Conspiracy ⇐47(12)

While defendant claimed that the evidence showed only one conspiracy, rather than two separately identifiable ones, and that his trial, conviction and consecutive sentencing on all counts violated the Fifth Amendment's double jeopardy clause by imposing multiple punishments for the same offense, the existence of separate conspiracies was established by proof that the objects of the conspiracies were different, viz., importation and distribution, that the persons involved were different, and that the locales were also different. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 406, 1013, 21 U.S.C.A. §§ 846, 963; U.S.C.A.Const. Amend. 5.

16. Criminal Law ⇐656(1), 1035(9)

While defendant complained that the trial court denied him a fair trial by interjecting references to his incarceration, the record established that references to his pretrial confinement were invited by defendant himself, that he failed to object thereto at trial, thus not preserving the alleged error for review, and that the objectionable statement was at most cumulative of other evidence placed before the jury without objection.

17. Criminal Law ⇐371(1)

Propriety of admitting evidence of prior convictions to show intent is established by showing four factors: (1) plain, clear and convincing evidence of a prior similar offense; (2) not too remote in time; (3) in which intent is a material element; and (4) the proof of which is substantially needed by the Government to the extent that material prejudice to the defendant is outweighed.

18. Criminal Law ⇐369.2(1), 1043(2)

Defendant's prior conviction, while elementally nearly identical to the charges in the instant case, was committed 12 years before and was too remote to possess probative value; further, the need for the proof was outweighed by the potential prejudice to defendant; however, defendant's objection at trial was too loosely formulated and imprecise to apprise the court of the legal grounds for his complaint and the error was thus not preserved for appellate review.

19. Criminal Law ⇐371(1)

Where the evidence is not reasonably susceptible of the interpretation that the acts alleged to constitute the crime were innocently performed and no defense is presented which may properly be rebutted by the introduction of a prior conviction, the intent exception to the rule against admitting prior convictions is not available to the prosecution.

20. Criminal Law ⇐1169.11

Improper admission of an extraneous offense can constitute harmless error.

21. Drugs and Narcotics ⇐103

Indictment's second count, charging illegal importation of marijuana, was not fatally defective in failing to include "knowingly or intentionally" in its language, where the language used was accompanied by specification of the statutory section numbers, and where the

jury was charged that they had to find knowledge or intent in order to convict. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 1002(a), 1010(a)(1), 21 U.S.C.A. §§ 952(a), 960(a)(1).

22. Indictment and Information ⇐109

An indictment is defective if it fails to allege scienter elements expressly contained in pertinent statute, but the elements need not be alleged in terms, and a pleading is good if it fairly imports knowledge or intent.

Appeals from the United States District Court for the Western District of Texas.

Before COLEMAN, CLARK and INGRAHAM, Circuit Judges.

INGRAHAM, Circuit Judge:

Jose Demetrio Arteaga-Limones (Arteaga) and Mike Lozano Cantu (Cantu) appeal from their convictions of drug-related offenses. Arteaga was convicted under 21 U.S.C. § 963, conspiracy to import marijuana; 21 U.S.C. §§ 952(a), 960(a)(1), illegal importation of marijuana; 21 U.S.C. § 846, conspiracy to possess marijuana with intent to distribute; and 21 U.S.C. § 841(a)(1), possession of marijuana with intent to distribute. He received a sentence of five years imprisonment and five years special parole on each count, to be served consecutively. Cantu was convicted of the two latter offenses and received a sentence of five years imprisonment and five years special parole on each count, to be served concurrently. Both defendants assert numerous claims of error. Arteaga's appeal was argued orally to the court; that of Cantu was submitted on briefs only.

FACTS

In May 1974, during the trial of Julio Castillo-de la Garza (Castillo) on charges involving the illegal importation of a 300-pound shipment of hashish, evidence was developed that implicated Arteaga-Limones, Cantu and one Alvaro Moreno in the importation and distribution of 350 pounds of marijuana between January 1, 1973 and October 9, 1973. Castillo was convicted on the hashish charges and became the chief witness in the instant trial of Arteaga-Limones and Cantu. The following account of the events preceding and following the importation of the marijuana is primarily drawn from his testimony.

On or about January 30, 1973, Castillo and Arteaga travelled across the border to Ciudad Acuna, Mexico (the residence of Castillo), and carried back two sacks of marijuana. They stored the sacks at Arteaga's home in Del Rio, Texas, and later transported them to the San Antonio area and sold them to an unidentified purchaser. No money changed hands at the time of delivery, but Castillo later received several payments totaling approximately $60,000, which he turned over to Arteaga. Castillo then met Moreno, a narcotics dealer, and discussed transporting marijuana for him. Around May 5, 1973, Arteaga and Castillo met at Arteaga's home and traveled to a small ranch near the Mexican border, where they observed two of Arteaga's employees arrive from the direction of Mexico with sacks of marijuana. Arteaga and Castillo stored the sacks at Arteaga's house. Later, when Moreno asked to buy some marijuana from Castillo, Castillo told him of the recent importation. Moreno requested a credit transaction. Castillo agreed, subject to Arteaga's approval. Arteaga agreed and implied that Cantu would make the delivery. The next morning, when Castillo met Cantu in a motel restaurant in San Marcos, Cantu told Castillo that part of the marijuana was in his car. Moreno came to the restaurant and left in Cantu's car. Arteaga arrived and reported that the rest of the marijuana was in another car parked nearby. Moreno returned to the restaurant and left in this car also. After two months passed without word or payment from Moreno, Castillo traveled to New York to see Moreno. Castillo received $800 and returned to Ciudad Acuna. About a month later Castillo and Arteaga received $11,500 from Moreno. None of the marijuana was recovered, since it had already entered the distribution network by the time Castillo's account came to light.

CANTU

Cantu asserts claims of error relating to the sufficiency of evidence, the sufficiency of Count Four of the indictment and the admission of an extraneous offense.

[1] 1. *Sufficiency of the evidence.* Cantu challenges the sufficiency of the evidence to support his conviction on Counts Three and Four, asserting that there was no evidence "other than hearsay" to establish the existence of a conspiracy or Cantu's connection with it, and no evidence of Cantu's possession of the marijuana with intent to distribute it. We begin by noting that Cantu received concurrent sentences for the violations; accordingly, if the proof be adequate as to either count, no reversible error is present. *Hirabayashi v. United States*, 320 U.S. 81, 63 S.Ct. 1375, 87 L.Ed. 1774 (1956); *United States v. Ransom*, 515 F.2d 885, 891 (5th Cir. 1975).

[2–4] We approach the evidence with the responsibility to view it on appeal in the light most favorable to the government, as required by *Glasser v. United States*, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1941). Accordingly, we have no difficulty finding sufficient evidence to support both the conspiracy and substantive charges. Castillo's account firmly establishes a basis for the existence of a conspiracy between himself, Arteaga and Moreno. Only slight evidence is required to link a defendant to a conspiracy once the fact of conspiracy has been established. *United States v. Lawson*, 523 F.2d 804, 807 (5th Cir. 1975); *United States v. McGann*, 431 F.2d 1104, 1107 (5th Cir. 1970), *cert. denied*, 401 U.S. 919, 91 S.Ct. 904, 27 L.Ed.2d 821 (1971). We believe that a jury could reasonably find, from the testimony as to Cantu's involvement with Castillo, his provision of a hiding place for the marijuana and his service as a delivery courier, that he participated in the conspiracy as charged in Count Three. *See United States v. Sanchez*, 508 F.2d 388, 392–93 (5th Cir.), *cert. denied*, —— U.S. ——, 96 S.Ct. 45, 46 L.Ed.2d 44 (1975). The latter activity allegedly involving a transfer of marijuana at San Marcos, Texas, also provides a valid basis for a finding that Cantu possessed marijuana with intent to distribute it as charged in Count Four.

[5] 2. *Sufficiency of Count Four of the indictment.* Both Arteaga and Cantu urge that Count Four of the indictment, charging actual violation of 21 U.S.C. § 841(a)(1), was fatally defective in that it failed to allege any location for the commission of the offense.[1] They

1. Count Four read, in its entirety:

COUNT FOUR
(21 U.S.C. § 841(a)(1))

That on or about May 16, 1973, the exact date unknown to the grand jurors, Defend-

support their position with language from *United States v. Miranda*, 494 F.2d 783, 788 (5th Cir.), *cert. denied*, 419 U.S. 966, 95 S.Ct. 228, 42 L.Ed.2d 181 (1974), stating that "[f]ailure to specify the precise location of the offense is not fatal if the district is alleged." From this statement they infer an alternative rule that where the district is not alleged, the failure to specify the location of the offense is fatal to the indictment. We refuse to make this inferential interpretation. In *Miranda*, this court specifically noted that the validity of an indictment under Rule 7(c) is determined by practical, not technical, considerations. 494 F.2d at 788, citing *United States v. Miller*, 491 F.2d 638, 649 (5th Cir.), *cert. denied*, 419 U.S. 970, 95 S.Ct. 236, 42 L.Ed.2d 186 (1974). *Miranda* further held that the sufficiency of the indictment must be tested under the standard enunciated in *Hagner v. United States*, 285 U.S. 427, 52 S.Ct. 417, 76 L.Ed. 861 (1932). It cited as support for the statement on which Arteaga and Cantu rely *United States v. Tomasetta*, 429 F.2d 978 (1st Cir. 1970). *Tomasetta* specifically repudiates the proposition that any single averment determines the sufficiency of the indictment[2] and states "[t]he failure to specify with greater precision the location of the alleged offense would surely not have given rise to this [reversal for insufficiency] [had] sufficient additional facts [been] averred." *Id.* at 980. The statement in *Miranda* was intended as no more than a summary of the court's comparison between the *Miranda* and *Tomasetta* situations. The construction suggested by defendants would conflict with the law of all circuits that have faced this issued. *See United States v. Honneus*, 508 F.2d 566 (1st Cir. 1974), *cert. denied*, 421 U.S. 948, 95 S.Ct. 1677, 44 L.Ed.2d 101 (1975); *United States v. Powell*, 498 F.2d 890 (9th Cir.), *cert. denied*, 419 U.S. 866, 95 S.Ct. 121, 42 L.Ed.2d 103 (1974); *Flores v. United States*, 338 F.2d 966 (10th Cir. 1964); 1 C. Wright, Federal Practice & Procedure § 125 (1969).[3] It would not advance the policies of the Federal Rules of Criminal Procedure applicable to indictments. *See* F.R.Crim.P. 7(c), 18.

[6–8] While the counts of an indictment must stand independently for the purpose of being judged as to sufficiency, they need not be read apart from the caption and heading of the indictment, which clearly state that the action is being brought in the Western District of Texas, Del Rio Division. Defendants had the right to be tried in the district and division where the offense was committed, not the right to be *told* they would be tried there. *See Carbo v. United States*, 314 F.2d 718 (9th Cir. 1963), *cert. denied*, 377 U.S. 953, 84 S.Ct. 1626, 12 L.Ed.2d 498 (1964). Where, as here, no allegation of a variance between charges and proof is made, and no other circumstance demonstrating that the defendant was in any way disadvantaged has been brought to light, we refuse to find error in the fact that each count of this indictment did not repeat the division and district in which the crime was charged to have been committed.

3. *Admissibility of an extraneous offense.* The government offered evidence of Cantu's 1974 narcotics conviction to establish intent and a general scheme or design:

> Q Mr. Castillo, on or about May 2nd, 1974 were you convicted of an offense in violation of Federal law?
>
> A Yes, sir, I was convicted of possession and with intent to distribute 301 pounds of hash. And I am presently awaiting sentence.
>
> Q And hashish is a type of marijuana, isn't it?
>
> A Yes, sir, it's a substance of marijuana.
>
> . . . . . .
>
> Q All right, who else was convicted with you in that case?
>
> A In that *was* case was convicted Mike Lozano Cantu.
>
> Q All right. Looking around the courtroom today, do you see the person that you know of as Mike Lozano Cantu?
>
> A Yes, sir.
>
> Q Would you describe where he is in the courtroom and what he is wearing?
>
> A He's over here. He's wearing a yellow suit and brown with long hair and a brown shirt.
>
> MR. KERR: Your Honor, at this time I'll offer into evidence Government's Exhibit Number One.
>
> THE COURT: All right, any objection, Mr. Gonzalez?
>
> MR. GONZALEZ: Your Honor, we are going to object to that, if the Court please, because it's being offered prior to the taking of the stand by the Defendant. It serves no purpose whatsoever in this case.
>
> THE COURT: Well, are you taking the position that this conviction is not admissible?
>
> MR. GONZALEZ: We are taking the position that this Defendant was not tried with my client. It was an entirely separate hearing. They were not tried together. And I don't think that anything that might have happened to my client has any bearing in this particular case because it was a separate and distinct offense.
>
> THE COURT: Let me ask you this: I have forgotten because I've tried a good many of these cases, but were they tried together, Mr. Kerr?
>
> MR. KERR: Your Honor, Mr. Cantu pled guilty.
>
> THE COURT: That was my recollection. And you are merely introducing this particular judgment that I entered in this case as Government's Exhibit Number 1 to show that he did plead guilty to the offense charged?
>
> MR. KERR: Your Honor, I am showing a separate marijuana conviction as a similar act which goes to the issue of intent which is an element of this offense. I'm also showing a general scheme or design which is related to the same scheme or design in this

ants JOSE DEMETRIO ARTEAGA-LIMONES, ALVARO MORENO, MIKE LOZANO-CANTU, Julio Castillo-de la Garza, (the said Julio Castillo-de la Garza being named as a principal but not as a defendant herein) and other persons to the grand jurors unknown, knowingly and intentionally did possess with intent to distribute approximately 350 pounds of marijuana, a Schedule I controlled substance.

2. The repudiation appears twice:

> [A]rbitrary rules as to the necessity, in the abstract, of a given averment have no place in the analysis, as the question is whether the indictment as a whole conveys sufficient information to properly identify the conduct relied upon by the grand jury in preferring the charge.

429 F.2d at 979.

> [In concluding that the indictment is insufficient] we stress that no one factor is determinative.

Id. at 980.

3. Professor Wright suggests that, in these circumstances, a bill of particulars should have been made available to the defendants upon request. *Id.* at 246. No such request appears in the record.

case. Mr. Gonzalez is absolutely correct that it is a different case, but it is an identical offense.

THE COURT: Well, in order to get it in, you have to establish that it is—while the Fifth Circuit Court of Appeals says similar, I think it almost means identical. I believe that it was testified that hash is a form of marijuana. Is that right, Mr. Castillo-de la Garza?

THE WITNESS: Yes, it is marijuana.

THE COURT: And this was a marijuana conviction. If there any doubt about that?

MR. GONZALEZ: Yes, sir. In addition to that, sir, this is an offense which took place in October of 1973 while the Defendants are now on Trial for an offense that took place in 1972.

THE COURT: You mean you are taking the position now that the plea of guilty to the charge involving marijuana is too remote? '73 is very recent.

MR. GONZALEZ: I am taking the position that it is not admissible as original evidence. That it would be admissible for impeachment purposes.

THE COURT: Oh, no. I'll overrule the objection. I'll receive it into evidence. Government's Exhibit Number 1 will be received in evidence.

[9] The foundation laid for the introduction of Cantu's 1974 conviction established that, although it involved a different load of drugs, it resulted from the same conspiracy for which Cantu was on trial in this case and was closely connected in time with the events alleged here. *See United States v. Goodwin*, 492 F.2d 1141, 1152–53 (5th Cir. 1974); 2 J. Wigmore, Evidence § 304 at 202–03 (1940). Thus the prior conviction of Cantu was clearly admissible, as pointed out by the government at trial, to show a common design, scheme or plan. Here, evidence was admitted on an incorrect theory to establish criminal intent. *United States v. Miller*, 500 F.2d 751, 761–63 (5th Cir. 1974). But the evidence was properly receivable on another theory specified by counsel for the government to establish a common scheme or design. *United States v. Yaughn*, 493 F.2d 441 (5th Cir. 1974). Defense counsel asked only that the evidence be excluded. In this situation, we hold that the technical error of the trial court in apparently basing his ruling on the wrong ground did not result in prejudice to Cantu and does not require reversal. *See* C. McCormick, Evidence § 52 at 117 (Cleary Ed.1972).

Additionally, it is clear that Cantu failed to state a specific objection to the admissibility of the 1974 conviction. Cantu's objection was too loosely formulated and imprecise to apprise the court of the legal grounds for his complaint, and thus did not preserve error. *See United States v. Fendley*, 522 F.2d 181, 185–86 (5th Cir. 1975).

ARTEAGA

Arteaga asserts nine claims of error that are individually considered below.

[10, 11] 1. *Sufficiency of the evidence.* The standard for review, irrespective of whether the evidence is direct or circumstantial, is whether reasonable minds could conclude that the evidence is inconsistent with the hypothesis of the accused's innocence. *United States v. Ragano*, 520 F.2d 1191, 1203 n. 16 (5th Cir. 1975). The evidence adduced at trial clearly supports the jury's verdict of guilty.

[12] 2. *Jury argument.* During the government's closing argument, the prosecutor stated:

> Ladies and Gentlemen, for you to find the Defendants not guilty, you are going to have to disbelieve Mr. Castillo's statements and testimony, and you are going to have to believe that the Government would bring to you evidence of that nature knowing that it was not subject to being believed and that his veracity and credibility could not be believed. You are going to have to totally disregard all that Mr. Castillo has told you.

Arteaga did not interject an objection at trial to the government's argument. Nevertheless, for the first time on appeal, he argues that the prosecutor's remarks improperly vouched for the credibility of its primary witness Julio Castillo. Although we recognize that the government's arguments were improper and unprofessional,[4] the remark did not constitute plain error. Therefore, because defense counsel did not object at trial, error is not preserved for appellate review. *E. g., Fogarty v. United States*, 263 F.2d 201, 204 (5th Cir.), *cert. denied*, 360 U.S. 919, 79 S.Ct. 1437, 3 L.Ed.2d 1534 (1959). Furthermore, the trial court's repeated admonitions to the jury that nothing said during argument can be considered as evidence (R. 357, 365, 373, 374, 375, 379) dispelled any prejudice which might have arisen from the prosecutor's closing argument. *See, United States v. Davis*, 487 F.2d 112, 124–25 (5th Cir. 1973), *cert. denied*, 415 U.S. 981, 94 S.Ct. 1573, 39 L.Ed.2d 878 (1974); *United States v. Corbett*, 518 F.2d 113, 116 (8th Cir. 1975).

3. *Instructions on the credibility of a government witness.* During cross-examination Julio Castillo admitted that he perjured himself at an earlier trial "to get out of the charge":

> Q And at that time [when you were being tried in Del Rio, Texas] he asked you this question: 'Okay, now did you testify under oath on March 4, 1974 in San Antonio?'
>
> A Yes.
>
> Q And your answer to that question was "did I what?" And the following question was "Did you testify in Court in San Antonio on March 4th?" And your answer to that was "Yes. I said that I never deal with dope or nothing." Is that correct, sir?
>
> A Yes, sir.
>
> • • • • • •
>
> A Well, I said that in Court because I was trying to hid. But now that I am—I have repented for what I did, you know. Now I'm telling the truth to everybody.
>
> Q At that time you were not telling the truth, is that correct?
>
> A No, sir, I was lying at that time.
>
> Q Sir?
>
> A I was lying at that time.
>
> Q You were lying then, sir?
>
> A Yes.
>
> • • • • • •
>
> A Well, I said [that I worked as an undercover agent for the DEA in May 1973] in Court, you know, because all of the Special Agents, all of narc agents, they are all my friends. Since I got back from Mexico City, I was

4. *See Lawn v. United States*, 355 U.S. 339, 359 n. 15, 78 S.Ct. 311, 323, 2 L.Ed.2d 321, 335 (1957); *Hall v. United States*, 419 F.2d 582 (5th Cir. 1969); *United States v. Coppola*, 479 F.2d 1153, 1163 (10th Cir. 1973); *United States v. Cummings*, 468 F.2d 274, 278 (9th Cir. 1972); *United States v. Handman*, 447 F.2d 853 (7th Cir. 1971); ABA, *Code of Professional Responsibility* DR 7-106(C)(3–4), EC 7–13.

working in Las Alpes as the Manager over there and I met everybody, you know.

THE COURT: That isn't what he asked you. Did you testify under oath in the trial in which a Jury verdict was returned on May the 3rd, 1974, that you were working as an undercover Agent for the Mexican and the United States Government?

THE WITNESS: I'm not sure, you know. I'm not sure if I said it or not. But I didn't work with them.

THE COURT: All right, he admits he didn't work with them. He doesn't remember what his testimony was, but in other words, that was not true?

THE WITNESS: Right. I did not work for them.

Q (By Mr. Reich:) Then if that is within your record, then you were not telling the truth then, is that correct?

A No. I knew I was doing the wrong. I was doing wrong.

Q But if it's in the record that you testified that you were working for the federales and the Agents here in the United States, Drug Enforcement Agents, then you were lying then?

A Well maybe. I don't know. I don't know if I was lying. I don't remember.

Q I'll ask you whether or not you are telling the truth now or are you lying?

A Now I'm telling the truth.

Q Now you are telling the truth?

A Yes, sir.

The trial court instructed the jury, in pertinent part, as follows:

> You are indeed the exclusive judges of the credibility, and credibility means and it is synonomous with believability of the witnesses and the weight to be given to the testimony of each witness who appeared before you.
>
> • • • • • •
>
> Now as exclusive judges of the credibility or believability of the witnesses, you must consider the testimony of all the witnesses who appeared in the case. In this connection, you can disregard all or any part of the testimony of a given witness and you can accept that portion of the witnesses testimony which you feel that you can and should believe, and you can reject all or any part of the remainder of the testimony which you feel is not plausible or worthy of your belief.
>
> • • • • • •
>
> Now, there has also been evidence of accomplice testimony in this case, that is, Mr. Castillo-de la Garza, a witness in this case. Now, an accomplice is one who voluntarily and with common intent participates with another person in the commission or the planning of a criminal offense. Now, an accomplice does not become incompetent as a witness because of participation in the alleged criminal act charged. Quite to the contrary, the testimony of an accomplice alone if believed by the Jury may be sufficient and of sufficient weight to sustain a verdict of guilty as to any given Defendant even though not corroborated or supported by other testimony or other evidence. However, the Jury should keep in mind that the testimony of an alleged accomplice should be closely examined, received with caution and weighed with great care.
>
> On the other hand, if the Jury believes the testimony of an accomplice to be true beyond a reasonable doubt, that testimony is sufficient to convict a Defendant even though it is not corroborated by other witnesses testimony or other evidence. The Jury should not convict a defendant upon the unsupported, uncorroborated testimony however, of an accomplice unless it believes the unsupported testimony beyond a reasonable doubt.

Arteaga contends that the trial court's failure to caution the jury on the weight to be given testimony of an admitted perjurer constituted reversible error. Nevertheless, Arteaga neither requested a charge on the testimony of a perjurer nor objected to the trial court's failure to include such an instruction.

Rule 30 of the Federal Rules of Criminal Procedure provides that "[n]o party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection." *See United States v. Rodriguez*, 498 F.2d 302, 307 (5th Cir. 1974). The purpose of this is to provide the trial court an opportunity to correct any error or omission in the charge before the jury begins its deliberations. If prompt objection is made, the error can then be corrected. Wright, 2 Federal Practice & Procedure §§ 484, 496 nn. 47–50 (1969).

[13] Because Arteaga failed to request an instruction concerning the credibility of Castillo's testimony, the proper foundation was not laid to obtain a review of this alleged error. *Franano v. United States*, 310 F.2d 533 (8th Cir. 1962), *cert. denied*, 373 U.S. 940, 83 S.Ct. 1545, 10 L.Ed.2d 694 (1963); *Mims v. United States*, 254 F.2d 654 (9th Cir. 1958); *United States v. Muncy*, 526 F.2d 1261 (5th Cir. 1976).

4. *Due process and a "witness' failure of memory."* The indictment charged that the offenses occurred "on or about" certain specified days, "the exact date unknown to the grand jurors." From the outset the primary government witness acknowledged that he was unable to recall the exact dates during which the drug offenses occurred:

> A About a year-and-a-half ago I was looking for a connection to delve in narcotics in Mexico.
>
> • • • • • •
>
> A I knew a man that was dealing in narcotics. I talked to him if he could introduce me with somebody that would deal in narcotics. He told me he wasn't dealing in narcotics any more, that he was out. So he told me that he was going to meet me. He was going to introduce me to a man from Laredo, Mexico, Tamaulipas, Mexico. His name was Alvaro Moreno. That was about January or February, *I don't remember the exact date.* But they both came into my club, and Villarreal introduced me with him. And Moreno and me started talking. And I told him, you know, if I could help him on smuggling. He told me yes, because Villarreal is not working any more, in narcotics any more. He told me that he will be back in about a month.
>
> • • • • • •
>
> A [Mr. Arteaga] said Mike Lozano Cantu will deliver the marijuana at the Holiday Inn around 10:00 o'clock in the morning.
>
> Q All right.
>
> A The next day, May the 16th.

Q All right. Actually, Mr. Castillo—

THE COURT: May the 16th of what year would that have been?

THE WITNESS: 1973.

Q (By Mr. Kerr): All right, we don't know that that's the exact date, do we?

A Well no, I don't remember exactly, you know, if it was the exact date.

The evidence, however, clearly established that the offenses occurred before the return of the indictment and within the statute of limitations; accordingly, since the exact dates were not essential elements of the offenses, the inability of the government to prove the dates with precision was not fatal. *Russell v. United States*, 429 F.2d 237, 238 (5th Cir. 1970).

[14] On appeal Arteaga claims that because his defense of alibi was dependent upon a showing that he was no where near the place where the offenses occurred on the dates alleged, he was prejudiced by the government's failure to prove the exact dates of the offenses charged. Nevertheless, the record does not support Arteaga's contention, for his counsel took full advantage of Castillo's failure of memory. Counsel for Arteaga and Cantu subjected Castillo to extensive cross-examination concerning his inability to recall the exact dates of the criminal episodes (R. 136–46, 161–63, 166–70, 178–84, 189–90).[5]

Arteaga presented testimony from three members of a Mexican law firm with whom he conferred in Guadalajara from May 1 to May 20, 1973. In closing argument counsel stressed Castillo's inability to recall specific dates, arguing that the witness' failure of memory supported their contention that Castillo's account of the criminal transactions was a fabrication designed to secure leniency at the future sentencing procedure.

The court instructed the jury on matters of the presumption of innocence, the burden of proof and reasonable doubt, the defense of alibi, and the suspect nature of accomplice testimony. Additionally, placing the issue of the date of offense in its proper perspective, the court stated:

> Now, you will note that the Indictment charges that the offense or the complaints or the charges were committed on or about a certain date. It is not necessary that the proof establish with certainty the exact dates of the alleged offense. It is sufficient if the evidence shows beyond a reasonable doubt that the offense or incident was committed on a date reasonably near or approximating the date alleged.

The jury, exercising its responsibility as the sole judge of facts and credibility, concluded that Castillo's account was believable notwithstanding his inability to remember the exact dates of the criminal enterprise.

In light of the trial court's careful admonitions and defense counsel's vigorous cross-examination of the government witness, we conclude that Arteaga was not prejudiced by Castillo's failure of memory. Appellant's claim is without merit.

[15] 5. *Double jeopardy: one conspiracy or two?* Arteaga contends that the evidence here shows only one conspiracy, rather than two separately identifiable ones, and that his trial, conviction and consecutive sentencing on all counts violates the Double Jeopardy clause of the Fifth Amendment by imposing multiple punishments for the same offense. We find no merit in this claim. The objects of the two conspiracies were different (importation and distribution). The persons involved were different; for example, the evidence links Cantu only to the "distribution" portion. Finally, the locales were different. Castillo's account alleged that the importation took place in the Del Rio area; the distribution *began* there, but the ultimate consumers of the marijuana were in New York. Yet Castillo's story does not portray a regular "Del Rio connection" in which a New York-based operation regularly dealt with Castillo, Arteaga and Cantu, but the largely fortuitous consummation of a transaction previously contemplated only in barest outline. Clearly Moreno was the intended customer, but it is equally clear that other arrangements could and would have been made had Moreno's hoped-for purchase not materialized. Thus two distinguishable conspiracies may be charged, prosecuted and punished when the jury so chooses to interpret the evidence. *See American Tobacco Co. v. United States*, 328 U.S. 781, 66 S.Ct. 1125, 90 L.Ed. 1575 (1946).

[16] 6. *Destruction of the presumption of innocence.* Arteaga complains that the trial court denied him a fair trial by interjecting references to his incarceration. During direct examination of defense witness Richard Rios, chief jailer at the Val Verde County Jail, Arteaga's counsel elicited the following testimony:

Q How long have you been Chief Jailer in the Val Verde County Jail?

A A little over a year.

Q Are you the custodian of records over there and have access to the records?

A Yes, sir.

Q I'll ask you as a result of my request did you bring over a record of Jose Demetrio Arteaga?

A Yes, sir.

Q Do you have that with you?

A Yes, sir.

Q Would you please refer to that. Is this the official record as to when

5. The following is a brief excerpt from the lengthy attack on Castillo's failure to recall the exact dates relevant to the criminal transactions:

> Q Now Mr. Castillo, it's alleged in the indictment, and we are talking about Count Two of the indictment, that on or about May 5, 1973, the exact date unknown to the Grand Jurors, in the Western District of Texas, the Defendant Joe Demetrio Arteaga-Limones and Julio Castillo-de la Garza . . . it says nothing about Mr. Cantu?
>
> A Right.
>
> Q Was it on that date that the marijuana was brought across the river?
>
> A Which date did you say?
>
> Q May 5th, 1973.
>
> A I'm not sure, but it was about those dates. I'm not pretty sure, but it was about those dates.
>
> Q Well, would you say May the 1st, May 2nd, May 3rd, May 4th?
>
> A May 5th, yes.
>
> Q May 5th? 6th?
>
> A Yeah, about those dates.
>
> Q Would you say that you remember the date because May—
>
> A It was about ten days before Alvaro visited me in the Macarena.
>
> Q About ten days before?
>
> A Yes.
>
> Q The date that Alvaro visited you—
>
> A Six days or eight days, I don't know. It was about a week.
>
> Q The date that you say that Alvaro Moreno visited you at the Macarena was on May 16, 1973?
>
> A No.
>
> Q And May 15, 1973?
>
> A Alvaro was one day before we went to San Marcos.—In there. He was there, you know.

Mr. Jose Demetrio Arteaga entered the Val Verde County Jail?

A Yes, sir, it is.

Q Would you please recite the date?

A 8–23–74.

• • • • • •

Q (By Mr. Reich); Now, has he been confined within the Val Verde County Jail all of this time?

A Yes, sir.

Q Is this the record as to when an indictment was returned against him or is this the record when he first came in to the County Jail?

A This is when he first came in to the County Jail.

• • • • • •

Q (By Mr. Reich): Now, do you have all of the records of when Mr. Jose—Mr. Jose has not been out of Jail at any time for any particular reason as far as being let out on bond or otherwise from the date that he first entered the Jail on this offense which he is charged with?

A No, sir, he hasn't.

Q Well, you are certain that he wasn't there before then? As a matter of fact, if you will look on your records you will find July 16, 1974.

MR. KERR: Your Honor, Mr. Reich is impeaching his own witness.

THE COURT: I believe you are.

MR. REICH: I just want to find his records is all, Your Honor. The record should speak for itself.

THE COURT: Well, I would think so. Mr. Kerr, is there any doubt about this?

MR. KERR: Your Honor, I don't know because he's not in jail under a Federal charge. He is suggesting to this witness that Mr. Arteaga has been in Jail since July or August in connection with the Federal charge. He is a State prisoner. He is in Court today on the basis of a writ issued to the Sheriff. He is a State prisoner and he is not in Federal Custody and has not been in Federal custody since he was placed in jail.

THE COURT: I don't think he's a Federal prisoner over there, is he? Why is this important?

MR. REICH: Well, I just want to show how long the man has been in the Jail and also as to when Mr. Julio Castillo-de la Garza entered the Jail.

THE COURT: You mean how long he has been on the State charges?

MR. REICH: No, in Jail, straight through from the date he first got in Jail on the State charge and when the warrant was issued out on the Federal Charge.

THE COURT: Well, I'm sure this is interesting, Mr. Reich, but why is it relevant? What is the materiality of it?

MR. REICH: We will just skip that and we will go into the point as to Mr. Julio Castillo-de la Garza.

References to Arteaga's pre-trial confinement were invited by appellant himself. Additionally, because Arteaga failed to object at trial, error is not preserved for appellate review. *See United States v. Cochran*, 499 F.2d 380 (5th Cir. 1974), *cert. denied*, 419 U.S. 1124, 95 S.Ct. 810, 42 L.Ed.2d 825 (1975).

Evidence of a similar nature was elicited during the government's direct examination of Julio Castillo:

Q Mr. Castillo, on December 18, 1974 did you have a conversation with Mr. Arteaga?

A December the what, sir?

Q 18th, 1974. Just this last month.

A Yes, sir.

Q All right. Where was that conversation?

A In jail.

Q All right, where?

A Right here in the Del Rio County Jail.

Q All right, was anyone else present during that conversation?

A He was alone and Alfredo the Jailer was outside.

No objection was made by Arteaga or Cantu. Therefore, the objectionable statement was at most cumulative of other evidence placed before the jury without objection. *See United States v. McKinley,* 493 F.2d 547, 552 (5th Cir. 1974).

7. *Evidence of a prior conviction.* Arteaga complains that the trial court erroneously admitted evidence of a 1961 conviction for "smuggling marijuana."[6] The record reflects the following testimony relating to Arteaga's claim:

(At the Bench)

MR. REICH: Mr. Kerr has shown me a couple of exhibits which he intends to introduce through this witness. This witness has not taken the stand. A prior conviction cannot be used against him. If he does not take the stand, the Jury would have to be told not to consider anything pertaining to his record.

THE COURT: I happen to know the law. Here is my case, the United States versus Robert Fonseca. "Only prior misconduct or prior criminal activity, whether involving a connection or not, can only be introduced for the limited purpose of showing intent or knowledge."

MR. KERR: Your Honor, it can also show—

THE COURT: "Proof asserting a similar offense to establish necessary intent, the other offense proved must exclude the essential elements of the offense charged by competent evidence."

All right. Now, my next case, *United States v. Sanchez* was also in my Court. "It sustains any holding. In order to prove intent or guilty knowledge, other offenses offered and testified to must be similar."

MR. KERR: This is offered to show it is an identical offense. They went up on Robinson and it was affirmed by the Fifth Circuit.

MR. REICH: The fact is that this man hasn't taken the stand and doesn't intend to take the stand. And if in the event this is brought up, of course it will be detrimental to him.

THE COURT: Make your objection, and I will give the usual and standard instruction to the Jury. It can only be done for the limited purposes I have stated here. There is no question about it. I'll give you the cases. Fonseca is the latest case.

MR. REICH: I can find cases too, Your Honor.

THE COURT: In the cases decided by my overseers in New Orleans, I have to give the instruction. When you make an objection, I will have to limit it.

• • • • • •

6. The 1961 conviction was obtained under 21 U.S.C. § 176a, since repealed. The elements of the 1961 offense are very similar to those required for a conspiracy conviction under present 21 U.S.C. §§ 963 and 952(a), as charged in Count One of the case *sub judice*.

(In the presence of the jury)

Q And in 1961, did you have an occasion to meet an individual who has been identified to you as Jose Demetrio Arteaga?

A Yes, sir, I knew him.

Q All right, looking around the courtroom today, do you see that individual?

A He is seated at counsel table directly behind you on the corner at the back of the table.

MR. KERR: Your Honor, may the record reflect the Defendant has been identified.

THE COURT: Yes, the record will reflect the witness has identified the Defendant.

MR. KERR: May I approach the witness, Your Honor?

THE COURT: Yes, you may.

Q (By Mr. Kerr): Mr. Killman, I have handled to you what's been marked as Government's Exhibit Number 3. It lists the names of three individuals, one of whom is Jose Demetrio Arteaga.

A Yes sir.

MR. REICH: May it please your Honor, at this time we wish to offer our objection to any prior conviction or anything that has to do with any other matter other than this matter before the Court at this time.

THE COURT: All right. Now, what was the date of the alleged offense?

MR. KERR: 1961.

THE COURT: All right, what was the offense charged?

MR. KERR: Smuggling marijuana.

THE COURT: Was there a conviction?

MR. KERR: Yes, Your Honor.

THE COURT: All right, that's an identical offense. Members of the Jury, in order for you to consider prior or other similar convictions of this Defendant, Mr. Arteaga, for the same type or similar type of offense for which he is presently charged, you may consider it only for the limited purpose of showing knowledge or intent and for no other purpose. You are instructed that the fact that the accused may have committed an offense at some time is not any evidence or proof whatsoever that at a later date Mr. Arteaga committed the alleged offense or offenses, if any, charged in this particular case, this particular indictment, even though both offenses are of a similar or like nature.

If the Jury should find beyond a reasonable doubt from the other evidence in the case that the accused did the act or acts charged in this indictment, then the Jury may consider evidence of a prior or similar offense of a like nature in determining the state of mind or intent with which the accused did the act or acts charged in this Indictment, if any, and for no other purpose. It is limited to that.

MR. REICH: Note our exception, Your Honor, to the ruling of the Court.

[17] The propriety of admitting evidence of prior convictions to show intent is established by showing four factors: (1) plain, clear and convincing evidence of a prior similar offense; (2) not too remote in time; (3) in which intent is a material element; and (4) the proof of which is substantially needed by the government to the extent that material prejudice to the defendant is outweighed. *United States v. Urdiales*, 523 F.2d 1245, 1247 (5th Cir. 1975).

In this case the first and third prerequisites have been satisfied. The convictions were introduced by way of documentary evidence from court records and verified by oral testimony from government witness William D. Killman, a former customs agent stationed in Del Rio. Furthermore, it is clear from the language of the statutes that intent is a material element in this case. The use of Arteaga's twelve year old conviction, however, raises serious questions.

[18] The prior crime, while elementally nearly identical to the charges in this case, was committed *twelve* years before the activity charged to be criminal here. We adhere to our position in *United States v. San Martin*, 505 F.2d 918, 922–23 (5th Cir. 1974):

> The test for remoteness need not, and indeed cannot, be a simple rule of thumb based solely on the number of years that have elapsed between the prior crime and the present offense charged. The better test . . . is whether the prior crime is similar in nature and in its material elements to have clearly probative value with respect to the intent of the accused *at the time of the offense charged*.

Under the facts of this case, we conclude that evidence of Arteaga's 1961 conviction was too remote to possess probative value.

Also, the fourth element—the need for the proof as weighed against the prejudice to the defendant—was not satisfied in the instant case. In *United States v. Miller*, 500 F.2d 751 (5th Cir. 1974), this court wrote:

> Even if we were to assume that the prior conviction had some probative value in the present case, the government has done little to show any actual need for that evidence in view of other available evidence. Terry Lee Smith, the alleged co-conspirator, testified that McDuffie helped weld the still pots, helped mix the mash for fermentation, paid Smith for work at the still, and furnished a condenser, a still cap, wheat shorts, and plastic containers to Smith to be carried to the Macon area. If the jury believed that McDuffie actually performed these acts, they logically would infer from that conduct that he possessed the requisite criminal intent. *See Fallen v. United States*, 5th Cir. 1955, 220 F.2d 946, 948, cert. denied, 350 U.S. 924, 76 S.Ct. 213, 100 L.Ed. 808.

An almost identical situation is presented in the instant case. The alleged co-conspirator Castillo gave a compendious account of the smuggling operation, including approximate dates, places, participants and details of the operation, in much the same way the witness Smith did in *Miller*. The linchpin of the government's case against Arteaga and Cantu was Castillo's testimony, without which there is no evidence that any marijuana was ever smuggled at all.

[19] As was the case in *Miller*, it is highly unlikely that the jury would choose to believe the principal witness' testimony as to the existence of the contraband or the physical facts of the illegal activity but find that the acts were performed unknowingly or unintentionally. Arteaga did not limit his challenge to the *mens rea*; rather, he attacked the whole account. In such cases, the danger of convicting defendants for their evil character instead of their evil acts remains great. Where, as here, the evidence is not reasonably susceptible of the interpretation that the acts alleged to constitute the crime were innocently per-

formed and no defense is presented which may properly be rebutted by the introduction of the prior conviction, the intent exception to the rule against admitting prior convictions is not available to the prosecution. *See United States v. Miller, supra*; *United States v. Dryden*, 423 F.2d 1175, 1178 (5th Cir.), *cert. denied*, 398 U.S. 950, 90 S.Ct. 1869, 26 L.Ed.2d 290 (1970); *United States v. Klein*, 340 F.2d 547, 549 (2d Cir. 1965). Nevertheless, *United States v. Fendley*, 522 F.2d 181, 185–86 (5th Cir. 1975), precludes our review of appellant's claim. In *Fendley* defense counsel objected to the admission of business records because, among other things, the proffered evidence violated the general rule against hearsay. The court held that the objection was inadequate to preserve error:

> It appears to us that this loosely formulated and imprecise objection at most comes to this: (1) that the document was hearsay; (2) that the witness laying the foundation for its introduction was someone other than the preparer; and (3) that the witness laying the foundation was unable to personally attest to the accuracy of the figures contained in the document. There was no objection on the only grounds which would have permitted the trial court to have required that a fuller foundation be laid for the admission of the exhibit—that the printout was made and kept in the regular course of business, for regular business purposes and relied upon by the business, and finally that it was not "mere accumulations of hearsay or uninformed opinion." *United States v. Miller, supra*, 500 F.2d at 754.

The grounds asserted in the defendant's objection are clearly insubstantial. While, obviously, the document was hearsay, this in itself fails to state an objection as to whether the exhibit met the admissibility requirements of the Business Records Act.

* * * * * *

> The defendant now on appeal raises new grounds as a basis for objecting to the admissibility of Exhibit 9–108. In our view the defendant is foreclosed from making these objections at this time, as he failed to comply with the requirements of Rule 51, Federal Rules of Criminal Procedure, that he make "known to the [trial] court the action which he desires the court to take or his objection to the action of the court and the grounds therefor." Clearly if the defendant fails to object to the admission of evidence, objection is normally waived, *United States v. Maddox*, 492 F.2d 104 (5th Cir. 1974) unless the admission of such evidence is such clear error that it affects substantial rights. *See United States v. Davis*, 496 F.2d 1026 (5th Cir. 1974); *Sykes v. United States*, 373 F.2d 607 (5th Cir. 1966). Here, although the defendant objected in general terms on the three grounds of hearsay authorship and accuracy, he failed to object with that reasonable degree of specificity which would have adequately apprised the trial court of the true basis for his objection—if in fact he wished to object to the lack of a proper foundation under the business records statute. *United States v. Bryant*, 480 F.2d 785, 792 (2d Cir. 1973).

522 F.2d 181, 185–86.

Likewise, in *Arteaga*, appellant's objection was "too loosely formulated and imprecise" to apprise the trial court of the legal grounds for his complaint. Because *Arteaga* did not specify the legal theory on which he now relies—(1) too remote to possess probative value and (2) prejudice to the defendant outweighs the need for proof—error is not preserved for appellate review.

[20] Additionally, several recent cases have held that the improper admission of an extraneous offense can constitute harmless error. *E. g., Swanson v. Estelle*, 523 F.2d 1250 (5th Cir. 1975); *Thomas v. Savage*, 513 F.2d 536 (5th Cir. 1975).

In this case Arteaga made several incriminating remarks to Justice of the Peace Roger Cerny:

> (Direct examination by the government)
>
> Q Did Mr. Arteaga make any statement to you concerning the smuggling of marijuana?
>
> A Yes, sir, he did.
>
> Q Now, as best you can recall what did Mr. Arteaga state to you concerning his having smuggled marijuana?
>
> A He said that he had smuggled marijuana into this country.
>
> Q All right, and did he make any statement concerning his knowledge as to where to smuggle marijuana?
>
> A Yes, sir. He said that he knew every crossing point on the Texas Mexican Border.
>
> * * * * * *
>
> (Cross examination by counsel for Arteaga)
>
> Q All right. Now Mr. Cerny, you did recall the 27th. You stated nothing on the 16th, you are positive of that?
>
> A Counselor, on the 16th day of May 1974 in my office in Del Rio, Texas, 209 East Losoya, between the hours of 1:15 P.M. and 2:00 P.M., Mr. Arteaga told me during the course of the conversation with you present that he had smuggled marijuana and that he knew every crossing point on the Texas-Mexican Border. And this occurred on May 16, 1974.

Under the particular facts of this case, error pertaining to the admission of the 1961 conviction, if preserved, was harmless.

8. *Sufficiency of Count Four of the indictment.* Like appellant Cantu, Arteaga contends that Count Four of the indictment is fatally defective because it fails to allege any location for the commission of the offense. For reasons stated above, we conclude that Arteaga's claim is without merit.

[21, 22] 9. *Sufficiency of Count Two of the indictment.* Arteaga argues that Count Two[7] was fatally defective in failing to include "knowingly or intentionally" in its language. We disagree. An indictment is defective if it fails to allege scienter elements expressly contained in the pertinent statute. *See, e. g., Hagner v. United States*, 285 U.S. 427, 52 S.Ct. 417, 76 L.Ed. 861 (1932). But the elements need not be alleged in terms, and a pleading is good if it fairly imports knowledge or intent. 1 C. Wright, Federal Practice & Procedure § 125 at 243–44 (1969).

7. Count Two read, in its entirety:

> COUNT TWO
>
> (21 U.S.C. § 960(a)(1) & 952(a))
>
> On or about May 5, 1973, the exact date unknown to the grand jurors, in the Western District of Texas, Defendant JOSE DEMETRIO ARTEAGA-LIMONES and Julio Castillo-de la Garza, (the said Julio Castillo-de la Garza being named as a principal but not as a defendant herein), imported and caused to be imported approximately 350 pounds of marijuana, a Schedule I controlled substance.

Here, the language used was accompanied by specification of the statutory section numbers. The jury was charged that they must find knowledge or intent in order to convict. The indictment's adequate apprisal of the offense charged and the trial court's instruction concerning the need for evidence of scienter, prevented any injustice to Arteaga. *See Gearing v. United States*, 432 F.2d 1038 (5th Cir. 1970), *cert. denied*, 401 U.S. 980, 91 S.Ct. 1213, 28 L.Ed.2d 331 (1971); *Glenn v. United States*, 303 F.2d 536, 538–39 (5th Cir. 1962), *cert. denied*, 372 U.S. 920, 83 S.Ct. 734, 9 L.Ed.2d 725 (1963); *Tallman v. United States*, 465 F.2d 282 (7th Cir. 1972); *United States v. Mixon*, 374 F.2d 20 (6th Cir. 1967).

CONCLUSION

For the reasons stated, the convictions and sentences imposed are AFFIRMED.

CLARK, Circuit Judge, concurring in part and dissenting in part.

I concur in the affirmance of Cantu's conviction and in the portions of the majority opinion which reason to that conclusion. However, because I believe that in the circumstances of this case sufficient objection was made to the introduction of Arteaga's 1961 conviction at the trial below and that its introduction was not harmless error, I must dissent from affirmance of his conviction. Accordingly, I express no opinion on the other issues raised by Arteaga and reached by the majority.

The majority concedes that two of the four prerequisites for admissibility of a prior offense—nonremoteness and need for the evidence outweighing its potential for prejudice—are absent in the case at bar. *See* majority opinion at 2821–2823; *United States v. Urdiales*, 523 F.2d 1245 (5th Cir. 1975); *United States v. Miller*, 500 F.2d 751 (5th Cir. 1974). However, *United States v. Fendley*, 522 F.2d 181, 185–86 (5th Cir. 1975), is said to "preclude our review of appellant's claim" because Arteaga's counsel, like Fendley's, failed to make known the grounds of his objection as required by Fed.R.Civ.P. 51. I do not believe, however, that *Fendley* either articulates a legal rule or describes a situation so substantially identical to the facts before us that we are bound by that decision.[1]

Rule 51 analysis must proceed on a case-by-case basis. The language required to "make known" the ground for the action desired by counsel necessarily will vary with the facts and arguments presented to the court preceding the objection in question. Our cases and those of other circuits reject the proposition that counsel must always articulate objections in any fixed or certain style. *See Jackson v. United States*, 250 F.2d 897 (5th Cir. 1958); *United States v. Semensohn*, 421 F.2d 1206, 1209 (2d Cir. 1972); *cf. United States v. Indiviglio*, 352 F.2d 276 (2d Cir. 1965) (en banc), *cert. denied*, 383 U.S. 907, 86 S.Ct. 887, 15 L.Ed.2d 663 (1966). The question in each case must be whether the objection expressed its ground or grounds with *sufficient* specificity to focus the trial judge's attention on the legal issue involved. In the situation before us, four features not present in *Fendley* or any other case cited by the majority convince

1. To be responsive to the majority's view, the discussion of the sufficiency of Arteaga's objection assumes that he had the responsibility to justify the exclusion of the prior conviction rather than that, upon objection, the Government was required to respond to his objection with a proper authentication of the evidence. In fact, the latter is clearly required. *See United States v. Miller, supra*, 500 F.2d at 761–62 and n.14.

me that defense counsel's position was adequately expressed.

Fendley's counsel objected on the ground of hearsay. Of all rules of evidence, hearsay is the most riddled by exception—including the Business Records Act upon which the Government relied in *Fendley*. He objected on grounds which were not merely imprecise, but clearly *incorrect* under the Business Records Act. The objection was the same as meritless objections to several preceding exhibits. Finally, *Fendley* contains no indication that the trial court cut into or dominated the discussion on the objection.

By contrast, counsel for Arteaga did timely object to the introduction of the conviction on the basis of the general rule against admission of evidence of this type, a meritorious objection, as the majority notes. Second, the trial court itself before admitting Arteaga's prior conviction inquired of government counsel as to its date and received the answer "1961." Third, earlier in the trial, at the time of the introduction of Cantu's conviction, the only other time an instance of this type arose during the trial, the trial court itself had asked of Cantu's counsel whether he was objecting on the ground of remoteness. Finally, the trial court conducted the inquiry into the admissibility of the conviction in such a fashion as to limit severely the amount of discussion by counsel on both sides, to a degree that brings this case perilously close to classification as a "no-opportunity" case. *See, e. g., United States v. Huffman*, 467 F.2d 189 (6th Cir. 1972). In these circumstances, I cannot concur in an affirmance of Arteaga's conviction on the grounds that his objection to the unnecessary use of a 1961 conviction lacked specificity.

Trial judges must understand objections to expedite their rulings. Arteaga's counsel should have made a clear, precise objection by itemizing the criteria articulated in *Miller* and *Urdiales, supra*, and missing from the prosecution's argument below. But it seems plain to me that even in the absence of such clarity and precision, the trial court received from the combination of defense objections and its own requests sufficient information to have made the proper ruling as to admissibility of a conviction of this vintage. Therefore, I would adopt the functional approach of the Eighth Circuit in *United States v. Williams*, 484 F.2d 428 (8th Cir. 1973), which asks what the objection, considered in context, reasonably conveyed to the court and what prejudice the ruling carried for the defendant. Such a test does not stop at the literal words used by counsel.

Moreover, I cannot agree with the majority that the error was harmless beyond a reasonable doubt under *Kotteakos v. United States*, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946). The testimony of Justice of the Peace Cerny may provide some link between Castillo's story and Arteaga, but it lacks the tangibility or the authority of a prior conviction. The introduction of the conviction well may have stilled doubts about the credibility of Castillo's account of Arteaga's involvement in the minds of one or more jurors, since an account, specific or general, of a smuggling operation that may sound like the product of a fertile imagination when told about a defendant with no apparent history of crime may acquire an aura of truth if the actor is shown to have a record of prior criminal conviction. Then too, while the jury was informed that Arteaga had been convicted of a similar offense, they were not told that since 1964

he had not been in custody. If a prior conviction can be both relevant and necessary and at the same time harmless, it seems to me that at least the jury should have been told that Arteaga had "served his time" and been back in society for nine years to still reasonable doubts that the use of the conviction was harmful to Arteaga's defense. In these circumstances, I cannot say with assurance that Arteaga was convicted because the government proved beyond a reasonable doubt he committed the acts presently charged. I maintain it is likely that he was convicted because he was shown to have been convicted for a similar offense at a time too remote to have had any legal probity for the issues presented below.

I, therefore, respectfully dissent from the affirmance of Arteaga's conviction.

Adm. Office, U.S. Courts—West Publishing Company, Saint Paul, Minn.

UNITED STATES of America, Plaintiff-Appellee,

v.

Jose Demetrio ARTEAGA-LIMONES and Mike Lozano Cantu, Defendants-Appellants.

No. 75-1648.

United States Court of Appeals
Fifth Circuit.

June 9, 1976.

Appeals from the United States District Court for the Western District of Texas; John H. Wood, Jr., Judge.

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion April 8, 1976, 5 Cir., 1976, 529 F.2d 1183).

Before COLEMAN, CLARK and INGRAHAM, Circuit Judges.

PER CURIAM:

The Petition for Rehearing on behalf of Jose Demetrio Arteaga-Limones is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

CLARK, Circuit Judge (dissenting):

For the reasons stated in my dissent to the panel opinion, I would grant the petition for rehearing.

Adm. Office, U.S. Courts—West Publishing Company, Saint Paul, Minn.

United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term, 1975

No. 75-1648

D. C. Docket No. DR-74-CR-103

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOSE DEMETRIO ARTEAGA-LIMONES
and MIKE LOZANO CANTU,

Defendants-Appellants.

Appeals from the United States District Court for the
Western District of Texas

Before COLEMAN, CLARK and INGRAHAM, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Texas, and was argued by counsel for appellant, Arteaga-Limones and appellee, and was submitted on briefs by counsel for appellant, Cantu;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

April 8, 1976

CLARK, Circuit Judge, concurring in part
and dissenting in part.

Issued as Mandate: JUN 17 1976

(AS TO JOSE DEMETRIO ARTEAGA-LIMONES ONLY)

Supreme Court, U. S.
FILED
OCT 18 1976
MICHAEL RODAK, JR., CLERK

No. 76-52

In the Supreme Court of the United States

OCTOBER TERM, 1976

JOSE DEMETRIO ARTEAGA-LIMONES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

· OCTOBER TERM, 1976

No. 76-52

JOSE DEMETRIO ARTEAGA-LIMONES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 2805-2826) is reported at 529 F. 2d 1183.

JURISDICTION

The judgment of the court of appeals (Pet. App.) was entered on April 8, 1976. A petition for rehearing was denied on June 9, 1976 (Pet. App. 3913). Mr. Justice Powell extended the time for filing a petition for a writ of certiorari to July 23, 1976, and the petition was filed on July 15. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner was properly convicted for both conspiracy to import marihuana and conspiracy to possess marihuana with intent to distribute.

2. Whether the government's introduction, in its case in chief, of a 1961 conviction of petitioner for a similar offense amounted to reversible error.

3. Whether the government's witnesses' inability to remember the exact dates upon which the offenses were committed denied petitioner due process.

STATEMENT

Following a jury trial in the United States District Court for the Western District of Texas, petitioner was convicted of conspiracy to import marihuana (count 1), conspiracy to possess marihuana with intent to distribute (count 3), and the completed substantive offenses (counts 2 and 4), in violation of 21 U.S.C. 963, 952(a), 960 (a)(1), 846 and 841(a)(1). He was sentenced to consecutive terms of imprisonment for five years on each count, to be followed by consecutive special parole terms of five years. The court of appeals affirmed (Pet. App. 2805-2826; 529 F. 2d 1183).

The government's evidence showed that on or about January 30, 1973, Jose Castillo-de la Garza, a resident of Mexico, met with petitioner at the latter's home in Del Rio, Texas. Both men traveled to Acuna, Mexico, where they obtained sacks of marihuana which they brought back across the border to Del Rio. The sacks were stored in petitioner's home for ten to fifteen days and then taken by truck to San Antonio, Texas, where they were sold to

an unidentified purchaser. For this sale Castillo received approximately $60,000, which he gave to petitioner (A82-A89).[1]

In late January or early February 1973, Castillo met Alvaro Moreno, a narcotics dealer, who agreed to include Castillo in a future narcotics transaction (A20-A21, A25-A26).

On approximately May 5, 1973, Castillo drove petitioner from Del Rio to a small ranch by the border, where they observed two of petitioner's employees bringing 300-400 pound sacks of marihuana from Mexico. The sacks were initially taken to petitioner's house, but upon his direction that they be concealed elsewhere, the employees took them away. Two hours later the employees returned and reported that the marihuana had been hidden at the house of co-defendant Mike Lozano Cantu (A28-A42).[2]

Approximately two weeks later Castillo told Moreno about the marihuana (A27, A48). Moreno asked whether Castillo would sell the marihuana on credit and said that he wished to take delivery the following day at a motel in San Marcos, Texas. Castillo replied that he would discuss the matter with petitioner, and later that evening he told Moreno that petitioner had agreed (A50). The

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[1]Citations are to the appendix filed by petitioner in the court of appeals. We are lodging a copy of the appendix with the Clerk of this Court.

[2]Cantu was charged with possession of marihuana with intent to distribute and with conspiracy to commit that offense. He was sentenced to concurrent five-year terms of imprisonment with a five-year special parole term. He has not filed a petition for a writ of certiorari.

following morning Castillo drove to the motel in San Marcos. There he met Cantu, who brought a portion of the marihuana (A52). Petitioner arrived subsequently and announced that the remainder was in a parked car at a nearby supermarket parking lot. Petitioner drove Castillo to this location, where they met Moreno and gave him the marihuana (A52-A55).

When Moreno did not pay for the marihuana after two months, Castillo flew to New York City to see him. Moreno gave Castillo $800 and a promise of more money when the marihuana—which was still unsold and which he showed to Castillo—was marketed (A60-A62). A month later petitioner and Castillo received $11,500 from Moreno (A69-A70).

On May 16, 1974, petitioner and his attorney appeared at the office of Roger Cerny, a local justice of the peace, on unrelated matters. Petitioner admitted to Cerny that he had smuggled marihuana into the United States and remarked that "he knew every crossing point on the Texas-Mexican Border" (Pet. App. 2823).

ARGUMENT

1. Petitioner claims (Pet. 4, 7) that the Double Jeopardy Clause prohibits his conviction and multiple punishment for conspiracy to import marihuana and conspiracy to possess marihuana with intent to distribute. These conspiracies, however, amount to separate crimes, violating different federal statutes and proved by different facts, and the Double Jeopardy Clause is not offended by multiple punishments for multiple crimes. See *American Tobacco Co.* v. *United States*, 328 U.S. 781.

From the facts adduced by the government in this case, the jury might reasonably have concluded that the conspiracy to import marihuana terminated with its transportation across the border and concealment at

Cantu's house.[3] The marihuana remained there for a substantial time with no indication that petitioner or anyone else engaged in the importation venture had a continuing involvement in seeking means to distribute it. It was only by happenstance that Castillo met Moreno, who had not participated in the importation of the marihuana and who evidently was unaware of its existence when he renewed the offer he had made months before to include Castillo in one of his drug distribution ventures. On these particular facts, the jury could properly conclude that ensuing events were sufficiently unrelated to the earlier importation scheme to constitute an independent conspiracy. See *United States* v. *Varelli*, 407 F. 2d 735, 746 (C.A. 7), affirmed on remand *sub nom. United States* v. *Saletko*, 452 F. 2d 193, certiorari denied, 405 U.S. 1040.[4]

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[3]The district court charged the jury (Tr. 410) that each count of the indictment "alleges a separate and distinct offense as to each defendant and therefore you must determine each count separately, distinctly and apart from the others."

[4]*United States* v. *Honneus*, 508 F. 2d 566 (C.A. 1), certiorari denied, 421 U.S. 948, and *United States* v. *Adcock*, 487 F. 2d 637 (C.A. 6), said by petitioner (Pet. 4-5) to conflict with the decision below, are distinguishable. Both involved an indivisible, continuous conspiracy stemming from a single agreement. In both cases the court recognized that Congress has the power to condemn different aspects of related conduct as separate crimes if, as here, there are meaningful distinctions between the elements constituting each offense. *Honneus*, *supra*, 508 F. 2d at 569; *Adcock*, *supra*, 487 F. 2d at 639-640.

Contrary to petitioner's view (Pet. 5), there is no inconsistency between *Braverman* v. *United States*, 317 U.S. 49, and *American Tobacco Co.* v. *United States*, 328 U.S. 781. In *Braverman* the Court held that one agreement to commit several unlawful acts did not amount to several conspiracies under the general conspiracy statute (now 18 U.S.C. 371), stating that "[t]he single agreement is the prohibited conspiracy, and however diverse its objects it violates but

2. As part of its case in chief, and over petitioner's general objection to the admissibility of proof of any previous misconduct, the government introduced a 1961 conviction of petitioner for smuggling marihuana (A181-A183). The court of appeals found this to have been error, ruling that the 1961 conviction was too remote in time and that it was not so necessary to prove intent as to outweigh its possible prejudicial impact (Pet. App. 2820-2821). The court also ruled, however (with one judge dissenting), that petitioner's imprecise objection to the admissibility of this evidence at trial had been too generalized to preserve the point on appeal, and that, in any event, the error

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a single statute [Section 371]" (317 U.S. at 54). The defendants in *American Tobacco* unsuccessfully sought to raise *Braverman* as a bar to their convictions for conspiracy to restrain trade, in violation of Section 1 of the Sherman Act, and for conspiracy to monopolize, in violation of Section 2. They said that "there is but one conspiracy, namely, a conspiracy to fix prices" (328 U.S. at 788). The Court in effect explained, however, that a single agreement with several unlawful objects might amount to more than one conspiracy if different elements of the agreement violate different conspiracy statutes: "In contrast to the single conspiracy described in [*Braverman*] in separate counts, all charged under the general conspiracy statute [18 U.S.C. 371], we have here separate statutory offenses, one a conspiracy in restraint of trade that may stop short of monopoly, and the other a conspiracy to monopolize that may not be content with restraint short of monopoly. One is made criminal by § 1 and the other by § 2 of the Sherman Act" (*ibid.*).

The present case, charging petitioner with conspiracy to import marihuana in violation of Section 963, and with conspiracy to possess marihuana with intent to distribute, in violation of Section 846, is like *American Tobacco* rather than *Braverman*. Thus, even if in this case the petitioner had agreed in one agreement both to import marihuana and to distribute it, the different unlawful objects of that agreement might amount to, and be charged as, different criminal conspiracies violating both Section 963 and Section 846. *United States* v. *Marotta*, 518 F. 2d 681 (C.A. 9); *United States* v. *Houltin*, 525 F. 2d 943 (C.A. 5).

was harmless in light of the ample evidence of guilt and other proof of petitioner's familiarity with marihuana smuggling (*e.g.*, his remarks to Judge Cerny) (Pet. App. 2822-2823).

Petitioner claims that the error was not harmless, relying on the dissenting opinion below (Pet. 8). This contention presents no issue of general importance warranting further review. Furthermore, the matter was correctly decided by the majority below, upon whose opinion we rely (Pet. App. 2823-2824).

Nor is there any reason for the Court to consider, as petitioner suggests (Pet. 8-9), a blanket rule forbidding the prosecution from introducing in its case in chief evidence of prior convictions for similar offenses. When relevant to prove a matter essential to support a conviction, prior similar convictions are expressly made admissible by Rule 803(22), Fed. R. Evid. Questions concerning the timing of the admission of such evidence, as well as those going to probative value (such as remoteness), are best left to the discretion of the trial judge, who is in the most favorable position to examine and resolve them in the context of the trial itself.

3. The indictment charged that petitioner committed the offenses "on or about" certain enumerated dates. From the outset the principal government witness, Castillo, acknowledged that he was unable to specify the exact dates on which the drug transactions occurred (A25, A49). Nor did any other government witness pinpoint the specific dates. Petitioner contends that the failure to prove the exact dates of the offenses charged denied him due process since his alibi defense was premised upon a showing that on the particular dates stated in the indictment he was far away from the places where the offenses were committed.

The dates on which the charged offenses occurred, however, were not elements of the crimes that the government was required to prove. Indeed, it would appear that the only reasons for including any dates in an indictment are to give the defendant adequate notice of the offense charged and to allow him to determine whether he has a defense under the statute of limitations. See *Ledbetter* v. *United States*, 170 U.S. 606, 612-613; *United States* v. *Somers*, 496 F. 2d 723 (C.A. 3), certiorari denied, 419 U.S. 832; *United States* v. *Arradondo*, 483 F. 2d 980 (C.A. 8), certiorari denied, 415 U.S. 924; *United States* v. *Antonelli*, 439 F. 2d 1068 (C.A. 1); *Russell* v. *United States*, 429 F. 2d 237 (C.A. 5). Defense counsel took full advantage of Castillo's lack of recall by cross-examining him on the matter extensively (A91-A100, A116-A118, A121-A125, A133-A139, A144-A145). In closing argument counsel stressed that Castillo's inability to recall specific dates was consistent with counsel's contention that Castillo's account of the crimes was a fabrication, designed to gain him leniency at a forthcoming sentencing hearing. The jury, as the sole judge of credibility, could rightfully conclude that Castillo was a believable witness notwithstanding his inability to pinpoint the dates of the activities about which he testified. Its decision not to accept petitioner's alibi defense did not deny petitioner due process.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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